Office-Supreme Court, U.S.
FILED
SEP 9 1963
JOHN F. DAVIS, CLERK

No. 604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FAIR DRAIN TAXATION, INC.,
a non-profit Michigan Corporation, et al.,
Appellants,

— vs. —

CITY OF ST. CLAIR SHORES,
a Michigan Municipal Corporation, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

WILSON M. JACKSON, and
WILLIAM L. SANDERS,
Attorneys for Appellants,
Suite 332 Eastland Center
Professional Building
Harper Woods 36, Michigan
Telephone: 371-5111

RAYMOND M. JACOBSON
Attorney for Appellants
Federal Bar Building
1815 H. Street, N.W.
Washington 6, D. C.

THE INLAND PRESS, DETROIT, MICHIGAN

INDEX

	Page
(A) Arguments as to Points Raised by Appellees In Their Motion to Dismiss	1
(B) Conclusion	20
(C) Citations	i
(D) Cases:	
16 CJS 293, Constitutional Law #92	2
Michigan Carolene Products Co. v. *Thompson*, 267NW 608, 276 Michigan 172	2
O'Neil v. *The United States*, in the Circuit Court of Appeals for Tennessee, 149 Federal 2d 908	4
Yakus v. *The United States*, in Mass., 64 S. Ct. 660	4
Osius v. *City of St. Clair Shores*, cited in 75NW 2d 25, 344 Michigan 693, 58 ALR, 2d 1079	4
Deveraux v. *Township Board of Genessee Township*, 211 Michigan 38, 177NW 967	5
White Brothers, Inc. v. *The City of Grand Rapids*, 260 Michigan 447, 45NW 509	5
Butterfield v. *Zydok*, 72 Supreme Court 1069, 343, U. S. 988	6
Redmond and Company v. The Michigan Securities Commission, 192NW 688	6
Morisette v. *The Board of Plumbing Examiners and Registration of Alabama*, 29 Southern 2d 333	6-7
Lee v. *Delmar*, 66 Southern 2d 252	7
Routt v. *Barrett*, 71NW 2d 660	7
Neuweiler v. *Kauer*, 107NW 2d 779	7
Moore v. *Harrison*, 244 Michigan 512	8
Holland v. *Clerk of Garden City*, 299 Mich. 465	8
Oakland County Drain Commissioner v. *City of Royal Oak*, 306 Michigan 124, 10NW 2d 435	8
Fitch Drain No. 129, 346 Michigan 639, 78NW 2d 600	9

	Page
Connor v. *Herrick*, 349 Michigan 201, 84NW 2d 427 decided July 31, 1967	9
Black Marsh Drainage District v. *Rowe*, 350 Michigan, 470, decided December 27, 1957	10
Township of Southfield v. *The Drainage Board for the Twelve Towns' Relief Drains*, 357 Michigan 49, 97NW 2d 821	12-13
City of Madison Heights v. *The Twelve Towns' Relief Drains Drainage Board*, 361 Michigan 522 (Cert. Den. 366 U. S. 919), 106NW 2d 126, decided December 1, 1960	13
International Salt Company v. *Herrick*, 367 Michigan 160, 116NW 2d 328, decided July 28, 1962	14
Petitions of Macomb County Drain Commissioner, 369 Michigan 641, 120NW 2d 789; M.T.A. 7-8	15
Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 70 Supreme Court, 652, 94 L. E. 865	18
Walker v. *The City of Hutchinson*, 352 U. S. 112, 77 Supreme Court 200, 1 L. E. 8d, 178. (J. S. 23-par. 14 of Amended Complaint.)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 604

FAIR DRAIN TAXATION, INC.,
a non-profit Michigan Corporation, et al.,
Appellants,

— vs. —

CITY OF ST. CLAIR SHORES,
a Michigan Municipal Corporation, et al.,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan,
Southern Division.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

(A)

ARGUMENT AS TO POINTS RAISED BY APPELLEES IN THEIR MOTION TO DISMISS

I

In the first paragraph of their arguments, (M.T.A. 4) the Appellees avoid the fact by stating that the only question presented is:

> "Whether or not the Michigan Legislature acted wisely in enacting this Drain Legislation."

It is not the wisdom of the Michigan Legislature that is being attack, but:

> "Whether or not the Legislature did infringe upon valid constitutional rights of the Appellants in the enactment of this particular Drain Legislation."

The subject of constitutionality of legislative enactments is a valid subject of judicial review.

The final authority in determining whether or not the Legislature, in enacting a Statute, acted within its constitutional authority is vested in the Judiciary, and, in a proper case, it is the duty of the Courts to declare an unconstitutional Statute void, notwithstanding it has long been treated as constitutional; but such power is exercised with caution, and a Statute should be upheld if it is reasonably possible to do so. (See 16 CJS 293, Constitutional Law #92 and the footnotes thereunder on footnote 1 quoting every Jurisdiction in the United States, including *Michigan Carolene Products* v. *Thomson*, 267 N.W. 608, 276 Michigan 172.)

II

Appellants agree with Appellee's statement that Appellants say that the Legislature, in this Drain Act, give the public corporations too much power; in fact, they go much further and state, as they have stated in the District Court, (J.S. 26, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38) that the Legislature unconstitutionaliy delegated to the public corporations and in particular these drainage boards too much power. Counsel for Plaintiffs stated to the District Court that this excessive delegation of quasi-judicial and quasi-legislative powers to the drainage districts were unconstitutional as a denial of due process of law to the Plain-

tiffs and that the Legislature could find a valid constitutional method of accomplishing their purpose.

III

It is well settled in American Law that the functions of legislation or the judiciary, may not be delegated by the Legislature to the executive department or to any executive or administrative officer, board, or commission, except as such delegation may be expressly authorized by a Constitutional Provision. The Michigan Constitution, Articles 4, Sections 1 and 2, entitled, "DIVISION OF THE POWERS OF GOVERNMENT", reads as follows:

> "DEPARTMENTS OF GOVERNMENT. Section 1. The powers of government are divided into three departments: The Legislature, Executive, and Judicial."
>
> "LIMITATIONS OF POWERS OF OFFICERS. Section 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this Constitution."

By these provisions the Michigan Constitution affords the measure of the powers which may be granted to purely administrative boards or officers. Hence, where executive officers or bodies are charged with administration of Statutes, the Legislature must prescribe a policy, a standard or a rule for their guidance, and must not vest them with an arbitrary or uncontrolled discretion with respect to the matters or persons to which the Statute shall be applied. (See CJS, Volume 16, Section 138, on Pages 572, 573, 574, and cases cited therein.)

Whether a particular power may be delegated to administrative offices depends on the substance of the power to be delegated and not the number of acts which may be

performed thereunder. *It has been held, however, that a delegation of powers to executive offices should be made only under circumstances which allow complete recourse to the Courts.*

Executive agencies cannot, of course, be empowered by the Legislature to exercise power which the Legislature itself does not possess. (Footnote 26 under Section 138, on Page 580, citing therein the *State Board of Agriculture* v. *The State Administrative Board*, 226 Michigan 417, Volume 16, CJS.)

The Legislature may delegate to executive officers or bodies the power to determine certain facts or conditions or the happening of contingencies on which the operation of the Statute is, by its terms, made to depend, but the Legislature must prescribe *sufficient standards, policies or limitations on their control.* (Volume 16 CJS, Section 138, Footnotes 37 and 38; *O'Neil* v. *The United States*, in the Circuit Court of Appeals for Tennessee, 140 Federal 2d 908; U. S. Case of *Yakus* v. *United States*, in Mass., 64 S. Ct. 660, and including therein the landmark Michigan Case of *Osius* v. *City of St. Clair Shores*, cited in 75NW 2d 25, 344 Michigan 693, 58 ALR, 2d 1079.

In the *Osius* case the problem was put by Mr. Justice Smith as follows:

> "The problem that the Plaintiffs complain primarily about is that the Zoning Board of Appeals is exercising by delegation, a legislative function, which they condemn as unconstitutional, and that this delegative legislative function is exercised without guide or standard."

On top of Page 27, Mr. Justice Smith continues with the law on the subject:

> "There is no doubt that a legislative body may not delegate to another its law making powers. It must

promulgate not abdicate. This is not to say, however, that a subordinate body or official may not be clothed with the authority to say when the law shall operate, or as to whom, or upon what standard, or upon what occasion, provided, however, that the standards prescribed for guidance are as reasonably precise as the subject matter requires or permits. As we said in *Deveraux* v. *Township Board of Genessee Township*, 211 Michigan 38, 177 NW 967."

"The Statute in question provides no method for the application for licenses, contains no qualifications which the applicant must possess, provides no standard of fitness, makes no provisions as to the character of the structure or equipment to be used in the business regulated. It, in fact, attempts to confer upon the township board the arbitrary power to grant or refuse a license, according to its whim or caprice. Under all the authorities, we think this cannot be done."

The Court in the same case, gives even a more narrow definition or example that would apply to this case when it at the bottom of Page 27 said:

In *White Brothers, Inc.* v. *The City of Grand Rapids*, 260 Michigan 447, 45NW 509, the Ordinance involved provided:

> Section 6. Whenever it shall appear to the City Manager from such investigation and report that the charity is a worthy one and that the person or persons making the application are fit and responsible parties, he shall issue a permit to such person, firm, corporation or society."

With reference to which Mr. Justice North speaking for the Court said as follows:

> "The ordinance contains no rules or provisions by which the City Manager is to determine whether the charity is worthy or the applicant is fit or responsible. In making his determination he may apply more and more of a great variety of qualifications which to

> the City Manager may seem proper, or he may grant or refuse the permit solely on capricious grounds, and he may apply one test to one applicant and another to another. The ordinance does not contain the slightest indication of the kind of charity or character of charity that is a 'worthy one'; and likewise it is wholly silent as to what type of qualifications would constitute an applicant for a permit 'fit and responsible'. We see no escape from the conclusion that the ordinance attempts to vest the City Manager with an arbitrary power in the exercise of which he will say to one applicant, 'yes', and to another, 'no'."

In determining whether there has been an unconstitutional delegation of Legislative power, the entire Act is to be examined; the meaning of words determined by their surroundings and connection (*Butterfield* v. *Zydok*, 72 Supreme Court 1069, 343, U. S. 988).

The State may delegate police powers to subordinate agencies but such powers belong to the State and can be exercised by agencies of the State only under delegation of authority. Although it has been said that an Agency of the State can exercise police powers only when such power has been clearly or expressly delegated to it, it has also been held that a delegation of such power will be implied when necessary to carry forward an enterprise of public interest and general welfare. The extent to which the power may be delegated is a subject of great difficulty. *An attempted delegation may be held illegal on constitutional grounds.* The police power if delegated, must define its purpose *in the means of attainment thereof, in language leaving no wide administrative discretion and no discretion at all in legislative matters.* (See 16 CJS, Page 909 and 910 citing under footnote 40 thereof: *Redmond and Company* v. *The Michigan Securities Commission*, 192 NW 688; *Morisette* v. *The*

Board of Plumbing Examiners and Registration of Alabama, 29 Southern 2d 333; *Lee* v. *Delmar*, 66 Southern 2d 252; *Routt* v. *Barrett*, 71NW 2d 660; and *Neuweiler* v. *Kauer*, 107NW 2d 779).

In paragraphs 26 through 32 of the Amended Complaint in this cause (J.S. 29-34, inc.), Sections of Chapter 20 are assailed as unconstitutional as a denial of due process of law in that they are arbitrary, confiscatory and an unconstitutional delegation of judicial or legislative powers to an administrative board without any safeguards, controls or guides, or standards to aid the board in arriving at its various determinations. Reference to these paragraphs and the attached various sections, are hereby adopted in total by reference, stating that within the law, as above cited, Chapter 20 wholly fails to meet the constitutional test and does, in fact, deny due process of law being an unconstitutional delegation of judicial and legislative powers, in violation of the doctrine of separation of powers as enumerated in the Articles 1, 2 and 3, and Sections 1 thereof, of the United States Constitution and of Article IV, Sections 1 and 2 of the Constitution of the State of Michigan for 1908.

IV

The fourth allegation of the Defendants in the middle of page five of the Motion to Affirm, is that Plaintiffs in effect do not state a cause of action and only state a number of generalities and various claims of constitutional violation in the form of legal conclusions. This, of course, the Plaintiffs deny, and state that their actual position and cause for action is in the Complaint. It is well settled in American Law that a Motion to Dismiss a pleading or a Motion that attacks a pleading admits, for the purposes of the Motion, the truth of all facts well pleaded in the pleading attacked

and any inferences fairly deducible therefrom. (871 CJS, pages 906 to 910 and citations thereunder.) As to the validity of the challenges on unconstitutionality raised in Plaintiffs' Complaint and the manner of their raising one must look to the Complaint (J.S. 19-52; 7-12). Careful examination of the Amended Complaint in this matter will give the lie to the position of the Defendants.

V

The next reason for affirmance on the part of the Defendants is that all the constitutional questions raised by Plaintiffs have already been decided by the Michigan Supreme Court previously. (M.T.A. 6). Plaintiffs and Appellants deny this. Following is a case by case breakdown of the Michigan cases cited by Defendants and Appellees.

a. *Moore* v. *Harrison*, 224, Michigan 512; *Holland* v. *Clerk of Garden City*, 299 Michigan 465: These cases were decided many years previous to the enactment of Chapter 20 and have no bearing or relationship to Chapter 20, since the language contained in these cases is in no way similar to that of Chapter 20.

b. *Oakland County Drain Commissioner* v. *City of Royal Oak*, 306 Michigan 124, 10 NW 2d 435: This case, decided on June 30, 1943, concerned a fifty (50) year contract whereby the City granted the County the right to construct and maintain a connecting sewer, in a certain street, in connection with a contract between the City and County for disposal of sewage in the County through the City's sewage treatment plant. The questions of law decided were the following:

> 1. Legislature has power to ratify ultra-vires contract entered into by municipal corporations for public purposes, thus ratifying the contract.

2. The County in establishing proposed sewage disposal system would be performing an authorized function in respect to public health, and the expenditure of money in the establishment of such system is not in violation of the constitutional prohibition against States loaning its credit in aid of any person, association or corporation.

3. Financing for the system being paid by grants from the Federal Government and by the issuance of county revenue bonds, the bond issue was not an "obligation" of political subdivisions such as cities and towns of the county within the debt limitation provisions of the Statute and Constitution. The explanation being that it was a county debt rather than the debt of the municipalities involved.

This case, like the two above, was decided many years previous to Chopter 20 of the Drain Code of Michigan of 1956.

c. In Re: *Fitch Drain No. 129*, 346 Michigan 639, 78NW 2d 600: This case, decided October 1, 1956, seems to be concerned with whether land owners, under a Petition for the establishment of a county drain, under an Act entirely different from Chapter 20 of the Drain Code of 1956, had sufficient notice; the Supreme Court at that time, holding that posting in five (5) public places was personal service on the landowners so as to inform them of the nature of the proceedings were legal, and the fact that two of the landowners in fact, were not personally served by the notices handed to their husbands, who handed it to them, was merely a technical defect, and that these technical defects should be raised and decided before subsequent and expensive steps are taken. This case, like the others; had nothing whatsoever to do with Chapter 20 of the Drain Code of the State of Michigan of 1956.

d. and e. *Connor* v. *Herrick*, 349 Michigan 201, 84NW

2d 427, decided July 31, 1957, and *Black Marsh Drainage District* v. *Rowe*, 350 Michigan 470, decided December 24, 1957. The *Connor* case is the first to go to the Michigan Supreme Court for construction of Chapter 20 of the 1956 Michigan Drain Code. An evenly divided Court determined that Mandamus should issue compelling the Defendant Chairman of the Drainage Board to execute a contract on this Chapter 20 drain. Mr. Justice Black, one of the Dissenting four Justices, characterized the matter as a:

> "non-adversary proceeding with questions raised solely to assist immediate sales of municipal bond products."

and further characterized the proceedings in this case as:

> "these 'friendly lawsuits', where public officials get together for submission to a Court of selected issues concerning which there is little or no disagreement amongst them, undoubtedly are begotten of need for immediate adjudication of validity of the legal proceedings by which required public improvements are usually financed. The good faith of such officials, when they proceed in that manner can hardly be questioned. Nevertheless, in however praise-worthy their energetic effort to get at the job of improvement may be, *we have no right at their instance to countenance or encourage elimination of the occasionally tedious requirements of due process.*
>
> It is no answer to say that our Writ, if issued in this case, will be binding only as to the parties before the Court, and that presently absent taxpayers in municipalities of all three counties will remain free to justifiably question of validity of proceedings taken in pursuance of said Chapter 20. I think we should face with candor the realities of the situation that would obtain, once we signify favorable answer to the posed question and the bonds required to finance this and the related drain proj-

> ects are sold. *What juridical chance would any taxpayer have of overcoming the established fact of actual investment and going construction involving millions?"*

However, in the *Connor* case Mr. Justice Carr, deciding in favor of Mandamus, stated several propositions of law regarding Chapter 20 that later, without any further elucidation by the Court, were adopted in the following words in the *Black Marsh* case:

> "The questions raised in this cause have been fully answered in the opinion of Mr. Justice Carr, in the case of *Conner* v. *Herrick*, 349 Michigan 21, 84NW 2d 427, to which reference is made and adopted as a part of this opinion."

The points made by Mr. Justice Carr, adopted in *Black Marsh*, are the following:

1. Provisions of Chapter 20 of the Drain Code of 1956 do not contravene constitutional provisions to the effect that the credit of the State shall not be granted to, nor in aid of any person, association or corporation, public or private, and that no city or village shall have power to loan its credit, nor to assess, levy or collect any tax or assessment for other than a public purpose inasmuch as protection of public health was a public purpose and within the functions of government, under police power.

2. The provisions of the Drain Code, authorizing creation of intra-county drains and authorizing assessments at large against public corporations and levy of ad valorem taxes were proper exercises of police power of the State, designed in their operation to protect and promote public health, and the provisions did not contravene home rule provisions of the Michigan constitution of 1908, being Article 8, Sections 20 and 21, reading as follows:

> "The Legislature shall provide by a general law

for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing and contracting debts."

Section 21. "Under such general law, the electors of each city and village shall have power and authority to frame, adopt, and amend its Charter, and to amend an existing Charter of the city or village heretofore granted or passed by the Legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this State."

3. The provisions of the Drain Code authorizing drain assessment at large against public corporations which is to be paid by ad valorem taxation although the drainage area does not include the entire area of the public corporation, does not take property without due process as to those taxpayers whose lands are not in the drainage area to be served.

4. Protection of public health is a matter of governmental concern and within the scope of police power.

5. The expressed limitation on power of the State under constitutional provision that the credit of the State shall not be granted to, nor in aid of any person, association or corporation, public or private, applies with equal force to municipalities of the State.

6. In proceedings by drainage districts and others against taxpayers, and others for declaratory decree, the drainage project was necessary, evidence sustained drainage boards' finding was necessary for the benefit of the public health and the citizens of the community.

f. Township of Southfield v. *The Drainage Board for the*

Twelve Towns' Relief Drains, 357, Michigan 59, 97 NW 2d 821: This case, decided July 13, 1959, was brought by various municipal corporations in Oakland County, Michigan against Drainage Boards created under the same Chapter 20 (J. S. 63-80), and decided:

1. Townships are not municipal corporations within the meaning, purpose, spirit or intent of the fifteen (15) mill State constitutional limitations providing that such limitation may be increased when provided for by a municipal corporate charter, and therefore the Drain Code did not operate to increase the fifteen (15) mill tax limitation of such Townships since the taxing power of the townships was what they might receive from allocation of the fifteen (15) mills, plus any increase voted by its electors and any participation by the townships in the drains had to be so limited.

2. The rest of the points involved in this case have strictly to do with the rights of the public corporations as such as against the drainage boards and in no wise was any decision made effecting the individual rights of freeholders and taxpayers.

g. *City of Madison Heights* v. *The Twelve Towns' Relief Drains Drainage Board*, 361 Michigan 522 (Cert. Den 366 U. S. 919), 106NW 2d, 126, decided December 1, 1960: This case decided only that after prior suit has been instituted to determine the legality of the formula arrived at by the Drainage Board for apportionment, and a portion of one township was severed and incorporated into a city, and the city thus formed allowed to intervene in the suits, although the city filed no pleadings therein, and where the Attorney for the city in open Court stated that although he would not be present at all times, he had no objection to the trial proceeding in his absence, and where the suits resulted in a

determination that the formula was not in abuse of the board's discretion and the determination was not appealed, the city was not entitled to a second opportunity to challenge the legality of the formula which then became res adjudicata.

h. *International Salt Company* v. *Herrick*, 367 Michigan 160, 116NW 2d 328, decided July 28, 1962: This case was not brought under Chapter 20, but under other sections of the Drain Code and decided the following:

1. Where the Drain Code provided for notice to be mailed to each property owner whose name appeared on the assessment role, together with his address, it constituted due process (Note: Chapter 20 does *not provide* for mailing to each property owner).

2. The provision of the Drain Code, providing for service by publication in newspapers and by posting is not sufficient as a matter of law to afford reasonable notice as required by due process.

3. The provision of the Drain Code that failure to send notice by mail shall not constitute a jurisdictional defect in validating a tax, if notice shall have been published and posted is *at variance* with requirements of the Statute directing mailing of notice to each taxpayer entitled thereto, and is *invalid*.

4. The presumption of regularity of official action must yield, in order to constitute due process of law, to a showing as to the actual facts.

5. The provision of the Drain Code giving conclusive effect to the Affidavit of the Drain Commissioner is invalid as a denial of due process.

6. Section 280.154 of the Michigan Compiled Law Supplement of 1956 (*not* any part of Chapter 20) with the exception of provisions providing for notice by publication and

posting and giving conclusive effect to the Affidavit of drain commissioner, is constitutional on ground that its conditions therein prescribed are complied with, due process of law is had.

7. DUE PROCESS OF LAW DEMANDS THAT THERE BE A MAILING WHICH IS A REASONABLE METHOD CALCULATED TO GIVE NOTICE OF HEARING AND IT IS ONLY MEANINGFUL IF THE ACT OF MAILING IS PERFORMED.

8. Where there was absence of proof that any notice of hearing on assessments under Drain Code was mailed to property owner, such owner was entitled to equitable relief, and hence the case would be remanded with directions that drain commissioner afford such owner right to hearing relating to assessment against owners property.

i. In Re: *Petition of Macomb County Drain Commissioner*, 369 Michigan 641, 120 NW 2d 789, M. T. A. 7-8): This case involves solely the question of whether or not the State Highway Department, one of the public corporations to be assessed under a Chapter 20 drain, had the drain assessed fairly against it in proportion to the other public corporations. No constitutional questions as to the validity of Chapter 20 were raised or decided in this case. The question solely was upon the fairness of the assessment as to the State Highway Department, based upon some formula used by this Defendant Drainage Board in its determinations. The lengthy quotation appearing on page seven of the Motion to Affirm from this case has nothing whatsoever to do with the constitutional questions involved herein, but merely discusses certain proceedings under Chapter 20. The implication that the Supreme Court of Michigan,

"has clearly decided that the delegation of legis-

> lative, administrative and judicial powers to the Defendant Drainage District and their Drainage Boards is constitutional under the Constitution of Michigan and the due process of law and equal protection of the law clauses thereof." (M.T.A. 8)

is completely false and misleading. The Supreme Court of Michigan has decided no such matter.

In fact, Appellants have gone to lengths in this Brief to expound upon decided cases of Appellees for the sole purpose of impressing upon this Court as does not seem to have been impressed upon the lower Court that by citing these cases the Appellees are misleading and misguiding this Court and giving completely contrary views of the actual decided cases. *There is no case in Michigan THAT HAS DECIDED THE CONSTITUTIONAL QUESTIONS RAISED BY THE AMENDED COMPLAINT OF THE APPELLANTS HEREIN. IF THE DISTRICT COURT BELOW HAD BEEN ABLE, AWAY FROM PRESSURE EXERTED BY THE APPELLEES HEREIN, TO GIVE DUE AND FAIR CONSIDERATION TO THESE CASES IN THE LIGHT OF THE AMENDED COMPLAINT FILED BY THE APPELLANTS, THEY WOULD HAVE COME TO THE SAME CONCLUSION AS IS HEREIN STATED: THE CONSTITUTIONAL QUESTIONS RAISED BY THE APPELLANTS IN THE AMENDED COMPLAINT HAVE NOT BEEN DECIDED BY THE SUPREME COURT OF THE STATE OF MICHIGAN IN ANY OF ITS DECISIONS.* That the District Court did not give due deliberation to this matter, can be seen from the statement of the Honorable Clifford O'Sullivan (M. T. A., page 30, the last sentence therein).:

> "Firstly, we wish that we could have more time for our contemplative consideration of the legal points involved, but we think, this being a matter

> of great public concern, in fact, it involves the health of the persons who will be affected by what we do, and therefore we cannot give ourselves that opportunity to more quietly and leisurely consider the legal questions. It is a matter of such emergency nature that prompt decision of it should be made."

That the Lower Court relied upon these improper interpretations of the law is apparent from the opinion of the District Court filed in this matter on July 16, 1963, appearing on pages 54 and 55 of the Jurisdictional Statement, wherein the Court said, in the second paragraph thereof:

> "It may be said at the outset that litigation with respect to practically all the issues in this action have been before various Courts of the State of Michigan immediately following the enactment of this legislation and continues to this day. As early as 1957, in *Conner* v. *Herrick*, 349 Mich. 201, and *Black Marsh Drainage District* v. *Rowe*, 350 Mich. 470, the Supreme Court of Michigan dealt with many of the issues presented here. See also subsequent opinion of the Court of last resort of Michigan, *Township of Southfield* v. *Drainage Board for Twelve Towns' Relief Drains*, 357 Mich. 59 (1959); *City of Madison Heights* v. *The Twelve Towns' Relief Drains Drainage Board*, 361 Mich. 322 (1960); in re: *Petition of Macomb County Drain Commissioner*, 369 Mich. 641 (April 5, 1963)."

Of the cases cited by the Appellees on page 6 of their Motion to Affirm and which have been heretofore delineated herein, the case of *International Salt Company* v. *Herrick*, 367 Mich. 160 is the only one that has any applicability to the constitutional questions raised in the Amended Complaint by Appellants and, far from sustaining the view of the Appellees, this case is four-square with the constitutional proposition enunciated by the Appellants that Chapter 20 does not afford these freeholders and taxpayers who

are entitled to notice, such notice as would reasonably calculate to inform the parties of proceedings which may directly and adversely affect their legally protected interests. (See *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 Supreme Court, 652, 94 L.E. 865; *Walker* v. *The City of Hutchinson*, 352 U.S. 112 77 Supreme Court 200, 1 L.E. 2nd, 178), (J.S. 23—par. 14 of Amended Complaint).

The constitutional issues by which Plaintiffs challenged Chapter 20 are those summarized in the statement of the case in the Jurisdictional Statement (J.S. 9 and 10), and no others.

Appellants are not urging the Federal Courts to adopt a statutory construction opposed to that adopted by a State Court. Appellants seek rightly to have decided constitutional questions of great import and effect on themselves.

VI

The objections stated by the Appellees, beginning with the second paragraph on page nine of the Motion to Affirm that the only questions presented before the lower Court were questions numbered five through 12 is disputed by the facts. On July 23, 1963, the Appellants filed their MOTION FOR CLARIFICATION OF THE COURT'S DETERMINATION, (J.S. 81-86). Wherein the matters raised by questions one and two or the Jurisdictional Statement (J.S. 3-4) are brought to the lower Court's decision, which was forthcoming on August 5, 1963, entitled "SUPPLEMENTAL OPINION" (J.S. 87-88). It is to be noted that in paragraph seven of the MOTION FOR CLARIFICATION OF THE COURT'S DETERMINATION (J.S. 85-86), Appellants recited to the District Court that they were preparing to take further action to seek the relief to which they felt

they were entitled, but were unable to do so because of what seemed to be contradictory positions of the Court. These contradictory positions are precisely what are challenged in questions one, two and three of the questions presented by this Appeal (J.S. 3-4). The confusion existing in Appellants mind because of this seemingly contradictory position as reflected by Judge O'Sullivan's pronouncement in open Court (M.T.A. 31; J.S. 85). On July 9, 1963:

> "We find that both the original and the Amended Complaint before us do not, either of them, state a cause of action, within the *jurisdiction* of this Court, nor do they state a cause of action."

and the formal judgment entered July 9, 1963 (J.S. 90),

> "It is hereby further ordered, adjudged and decreed, that the said Complaint and Amended Complaint be, and the same are hereby dismissed for failure to to state a claim upon which relief can be granted, with prejudice and with no costs."

and the opinion of the Court as filed July 16, 1963, (J.S. 54-62) as to question four, it is valid for the simple reason that Plaintiffs were not allowed the ten days time to answer the new matter raised by Plaintiffs in their MOTION TO DISMISS, which had not previously been before the consideration of the Court, and the rules stated in question four (J.S. 4) do require that ten days be given where new matter was introduced by way of Motion and this new matter was presented in Appellees (then Defendants) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (M.T.A. 15-21) In paragraphs A (M.T.A.), C (M.T.A. 16), G (M.T.A. 18-19), J (paragraphs 19 and 20), L (M.T.A. 20), and N (M.T.A. 21). All of these paragraphs brought out additional or new matters not within the scope or province of the Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Found, but

were based in part on matters that could be determined outside of the original or Amended Bills of Complaint.

All of the questions presented on this Appeal are substantial and merit the earnest consideration of this Court.

(B)
CONCLUSION

None of the Appellees' arguments in the Motion to Affirm (M.T.A. 4-11) can be sustained, as can be seen by the foregoing arguments. The position of the Appellees is untenable for the reason that it is predicated upon misinterpretation, misstatement and misleading evaluation of the decided cases of this state and of Federal decisions as it pertains to the constitutional question raised by the Complaint and the Amended Complaint heretofore referred ot in this matter. The Lower Court was stampeded into an ill-advised and ill-considered conclusion predicated upon an assumption of great urgency, which assumption was not borne out by fact nor or could it properly be considered upon a Motion to Dismiss. The questions raised are basic, elementary and yet of such magnitude and importance that an improper or improvident decision as heretofore rendered by the District Court cannot be allowed to stand, for such a conclusion would constitute a travesty of justice that would ultimately lead to taking of property without due process of law due to the res adjudicata effect of the improperly rendered decision. Accordingly, the Appellants urge this honorable Court to seriously consider the momentous questions raised in this Appeal and to determine these questions in light of the body of constitutional law existing which by its very nature, must hold the decision of the Lower Court must be reversed and the constitutional question raised in the Complaint and Amended Complaint determined in favor of the Appellants.